

For actions brought in the Superior Court of the Virgin Islands, “[t]he summons and process shall be served in the same manner as required to be served by Rule 4 of the Federal Rules of Civil Procedure[.]” Super. Ct. R. 27(b). Under Rule 4(m), when a plaintiff fails to serve a defendant within 120 days of the filing of the complaint, “the court – on motion or on its own after notice to the plaintiff - must dismiss the action without prejudice against the

defendant or order that service be made within a specified time.” Fed. R. Civ. P. 4(m). As the Superior Court noted in *Carty v. Mason*, “[t]he Federal Rules provide a timeline for service that plaintiffs should respect as they would respect a ‘time bomb.’” 2010 V.I. LEXIS 34, *8 (V.I. Super. Ct. May 6, 2010), quoting *Braxton v. U.S.*, 817 F.2d 238, 241 (3d Cir. 1987).

However, “[i]f the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.” Fed. R. Civ. P. 4(m). The plaintiff bears the burden of showing good cause to extend the time for service. *Beachside Associates, LLC v. Fishman*, 53 V.I. 700, 713 (V.I. 2010). Good cause under Rule 4(m) requires a demonstration of good faith and a reasonable basis for failure to timely serve. *Id.* This Court considers three factors in determining whether good cause is shown: (1) reasonableness of plaintiff’s efforts to serve; (2) prejudice to the defendant by lack of timely service; and (3) whether plaintiff moved for an enlargement of time to serve prior to the expiration of the period prescribed by the rule. *Bryant v. Caribbean Sun Airlines*, 49 V.I. 93, 95 (V.I. Super. Ct. 2007); *Charles v. Woodley*, 47 V.I. 202, 210 (V.I. Super. Ct. 2005). The primary inquiry, however, should focus on the reasonableness of a plaintiff’s efforts; “[w]hile the prejudice may tip the ‘good cause’ scale, the primary focus is on the plaintiff’s reasons for not complying with the time limit in the first place.” *Charles*, 47 V.I. at 210, quoting *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995). If plaintiff fails to demonstrate good cause, the Court must consider whether other factors warrant a permissive extension of time to effectuate service. *Beachside Associates*, 53 V.I. at 717-18.

II. DISCUSSION

A. Good Cause

1. *Reasonableness of Plaintiff's Efforts to Serve*

To decide whether Plaintiff has shown good cause for his failure to serve, the Court first determines the reasonableness of his efforts to serve. In doing so, the Court must examine the Plaintiff's reason, if any, for failing to serve within the time limit. A defendant's evasion of service is a quintessential example of good cause for plaintiff's failure to serve. *Charles*, 47 V.I. at 210. The Supreme Court of the Virgin Islands has held that repeated, improper attempts do not constitute a reasonable basis when these attempts were made after the 120-day period. *Beachside Associates*, 53 V.I. at 713. This Court has held that making "several efforts" to obtain a defendant's address does not excuse failure to serve, particularly when these efforts occurred after the 120-day period and include a "glaring" oversight such as the failure to contact the United States military regarding an enlisted defendant. *Charles*, 47 V.I. at 212. Additionally, a "mistaken assumption," resulting from a skip trace investigation, that a defendant lived with his mother and that serving her satisfied the need to serve the defendant did not excuse the failure to properly serve. *Id.* at 213. This Court has also held that pregnancy, health problems, lack of access to a telephone or a vehicle and other personal issues do not comprise reasonable bases for failure to serve. *Bryant*, 49 V.I. at 95. Further, this Court has made it clear that effectuating service within the time limit is a party's responsibility: "[A] party's misplaced reliance on representations by a process server, or even a court clerk, does not constitute good cause." *Id.* at 96.

In this matter, Plaintiff has provided the Court with no explanation as to why it did not effectuate service, despite the Court's Order of April 8, 2015. As the case law demonstrates, this jurisdiction takes a plaintiff's responsibility to effectuate service within the 120-day time period very seriously. Accordingly, Plaintiff has not demonstrated that its effort to serve Kurg was reasonable, and this factor does not favor a finding of good cause.

2. Prejudice to Defendant

Next, the Court examines whether Kurg has been prejudiced by Plaintiff's failure to timely serve. In examining this aspect of good cause, the Third Circuit has pointed out that delay caused by failure to effectuate timely service, "may damage a defendant's ability to defend on the merits." *Boley v. Kaymark*, 123 F.3d 756, 759 (3d Cir. 1997). The Third Circuit has also emphasized that, "actual notice [of the claim against them] 'is crucial' to determining prejudice." *Id.* (internal citations omitted). In *Beachside Associates*, the Supreme Court of the Virgin Islands held that the defendant was not prejudiced by untimely service because he had actual notice of the action against him vis-à-vis the plaintiff's first attempt to serve him¹. 53 V.I. at 713.

In this matter, there is no indication that Kurg has any actual notice of this action against him. Indeed, the complete lack of any filing or appearance from Kurg likely indicates that Kurg is unaware of this action against him. Accordingly, due to this lack of actual notice, this factor does not favor a finding of good cause.

¹ The defendant in *Beachside Associates* moved to quash the first service of process, which was attached to the door of his residence and mailed to him, on the grounds that it did not comport with New York law. 53 V.I. 704-705.

3. Motion for Enlargement of Time

Finally, the Court considers whether the plaintiff moved for an enlargement of time to serve prior to the expiration of the period prescribed by the rule. In *Beachside Associates*, the Supreme Court of the Virgin Islands indicated that “good faith” on the part of the party seeking an enlargement is necessary, and found that this aspect of good cause was not satisfied when the plaintiff did not offer any excuse for failing to move for an extension of time until approximately nine months after [the defendant] filed his first motion to quash and dismiss. 53 V.I. at 713. Here, Plaintiff did not move for an enlargement of time. Accordingly, this factor does not favor a finding of good cause justifying an extension of time to effectuate service of process.

B. Whether a Discretionary Extension is Warranted

Even if Plaintiff has not shown good cause, the Court must consider whether other factors warrant a permissive extension of time to effectuate service. *Beachside Associates*, 53 V.I. at 717-18; *see also Ross v. Hodge*, 58 V.I. 292, 300 (V.I. 2013). While the Court must consider whether a permissive extension is warranted, it is ultimately up to the Court’s discretion to grant or deny a permissive extension. *Id.* While not an exhaustive list, some factors that may warrant an extension include: (1) whether the applicable statute of limitations would bar the refiled action; (2) whether the defendant is evading service; or (3) whether the defendant is concealing a defect in attempted service. *Id.* at 718 (*referring to the Advisory Committee Notes to Fed. R. Civ. P. 4(m)*).

For tort claims in the Virgin Islands, the statute of limitations mandates that an action must be brought within two years of when the action accrued. 5 V.I.C. § 31(5)(A). Plaintiff’s

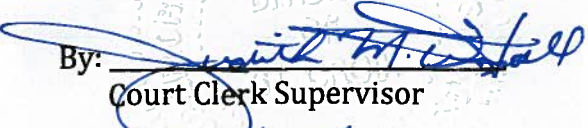
complaint does not indicate that Defendant's abuse of process occurred at any specific time, but indeed indicates that Defendant's tortious actions have been continuous since 2000, at least until the complaint was filed on July 30, 2014. Accordingly, assuming *in arguendo*, that Defendant's tortious conduct suddenly halted when the complaint was filed, as less than one year has elapsed it was filed, the statute of limitations would almost certainly not bar a refiled action. Nothing on the record indicates that Kurg is evading service or concealing a defect in attempted service. The record is also void of any reason that would warrant granting a discretionary extension in this case. Accordingly, this Court will not grant Plaintiff a discretionary extension to effectuate service upon Kurg.

III. CONCLUSION

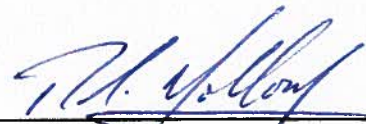
Plaintiff has failed to prove service of process upon Kurg, despite the Court's Order of April 8, 2015 directing Plaintiff to effectuate service of process upon Kurg or show good cause as to its failure to serve Kurg. As all three factors weigh against a finding of good cause, Plaintiff has also failed to show good cause as to why the time for service should be extended. The Court does not find that the other factors merit a permissive extension. An appropriate Order follows.

Dated: July 22, 2015

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 7/22/15



ROBERT A. MOLLOY
Judge of the Superior Court

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

SEABORNE VIRGIN ISLANDS, INC.,

Plaintiff,

v.

MAURICE KURG,

Defendant.

CIVIL NO. SX-14-CV-312

**ACTION FOR INJUNCTION AND
DAMAGES**

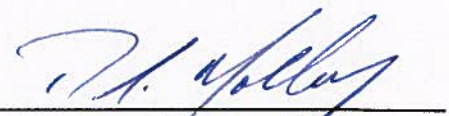
ORDER

THIS MATTER comes before the Court *sua sponte*. Plaintiff commenced this action by filing a complaint on July 30, 2014. Under Federal Rule of Civil Procedure 4(m), Plaintiff was required to serve Defendant Maurice Kurg ("Kurg") by November 27, 2014. On April 8, 2015, the Court issued an Order requiring that Plaintiff serve Kurg or show good cause as to why the Court should extend time for service pursuant to Fed. R. Civ. P. 4(m). Over three months have since elapsed, and Plaintiff has taken no further action on this case. Accordingly, after careful consideration and review, and for the reasons stated in the accompanying Memorandum Opinion dated July 22, 2015, it is hereby

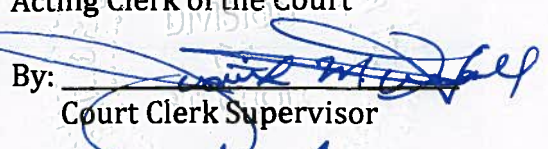
ORDERED that this matter is **DISMISSED WITHOUT PREJUDICE** for failure to effectuate service of process; it is further

ORDERED that this matter is **CLOSED**.

Dated: July 22, 2015


ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor

Dated: 7/20/15